

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND ) MDL NO. 13-2419-RWZ  
COMPOUNDING )  
PHARMACY CASES LITIGATION )

BEFORE: MAGISTRATE JUDGE JENNIFER C. BOAL

MOTION HEARING

John Joseph Moakley United States Courthouse  
Courtroom No. 2  
One Courthouse Way  
Boston, MA 02210

JULY 17, 2014  
2:30 p.m.

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PROCEEDINGS

THE CLERK: All rise. You may be seated.  
Today is July 17th, 2014. We're on the record in the  
matter of New England England Compounding Pharmacy,  
Incorporated, et al. The case number is 13-md-2419, and  
can I have counsel please identify themselves for the  
record starting with the plaintiffs' steering committee.

MS. PARKER: Good afternoon, your Honor,  
Kristen Johnson for the plaintiffs' steering committee.

02:44PM

MR. STRANCH: Good morning, your Honor,  
Gerard Stranch on behalf of the plaintiffs' steering  
committee.

MR. CHALOS: Mark Chalos for the plaintiffs.

MS. GREER: Marcy Greer for the St. Thomas  
entities and the Ascension parties.

MR. SCHRAMEK: Adam Schramek for the same  
parties.

MS. KELLY: Sarah Kelly for the St. Thomas  
entities.

02:45PM

MR. GIDEON: C.J. Gideon on behalf of the  
Tennessee Clinic Defendants.

MR. TARDIO: Chris Tardio for the Tennessee  
Clinic Defendants.

MR. BLUMBERG: Jay Blumberg for the Premier  
defendants.

1 MR. REHNQUIST: Good afternoon, your Honor,  
2 Jim Rehnquist for Unifirst.

3 MR. BRACERAS: Good afternoon, your Honor,  
4 Roberto Braceras for Unifirst.

5 THE COURT: All right. Is there anyone else  
6 who is in the courtroom who anticipates speaking today  
7 who wants to identify themselves?

8 (No response)

9 THE COURT: No. All right. So for purposes  
02:45PM 10 of the people on the phone, I would just ask that the  
11 counsel stay seated and actually just pull the  
12 microphones, if you can, towards you. I found that that  
13 is the best way to communicate the most effectively with  
14 the people on the phone, and I also apologize, we were a  
15 little slow getting here and particularly Mr. York  
16 getting here.

17 I'm on emergency criminal duty, and we had  
18 an unexpected visitor just before we got here so we  
19 needed to take care of that gentleman before we could  
02:46PM 20 get over to this courtroom.

21 Let me first start by asking, I don't know  
22 if there's anyone here from the trustee's office or if  
23 anyone can bring us up to speed on what's happening in  
24 the bankruptcy proceedings with respect to the  
25 settlement, and you probably need to come up to the

1 podium so that the people on the phone can hear you.

2 MR. GOTTFRIED: Michael Gottfried. I  
3 represent the trustee, Paul Moore. There was a hearing  
4 in front of Judge Boroff on Monday in the bankruptcy  
5 court in Springfield where the trustees' motions to  
6 approve the settlement with the affiliated defendants  
7 and the insiders was presented.

8 Judge Boroff indicated on the record that he  
9 was going to approve that settlement. A form of  
02:46PM 10 proposed order I believe may be submitted as soon as  
11 this afternoon, and that's the status.

12 THE COURT: All right. Then as I understand  
13 it, and this relates to motions that aren't necessarily  
14 before me but that there's framework set up in the  
15 settlement agreement to allow for discovery of the  
16 defendants that are in the bankruptcy court proceeding  
17 but at a certain point after the settlement has been  
18 approved. Is that correct?

19 MR. GOTTFRIED: The settlement agreement  
02:47PM 20 provides that within 10 business days after the entry of  
21 an order, the trustee will file a motion which addresses  
22 the scope of discovery as laid out in the settlement  
23 agreement specifically, and that settlement agreement  
24 was filed in the MDL.

25 One of the conditions, for example, in

1 Section 3.2, sub A, III is that that motion will address  
2 the permissibility of discovery against the estate  
3 parties, the contributors and the contributor and  
4 affiliate-released parties but only to the extent that  
5 discovery is relevant to the prosecution or defense of  
6 claims against defendants other than the estate parties,  
7 the contributors and the contributor and  
8 affiliate-released parties.

02:48PM 9 The position that I took on behalf of the  
10 trustee at the last MDL status conference with  
11 Judge Zobel was that the stay as it relates to these  
12 parties would be best addressed in the context of the  
13 filing of this motion should Judge Boroff approve the  
14 settlements, and that's still our position.

15 THE COURT: All right. Thank you. Does  
16 anyone else wish to address what's going on in the  
17 bankruptcy court?

18 MS. PARKER: Briefly, your Honor, if I may.  
19 Let me start by saying I don't disagree with anything  
02:48PM 20 that Mr. Gottfried just said. I will clarify though  
21 that fundamentally the settlement agreement contemplates  
22 that there will be discovery taken from NECC, the other  
23 affiliated entities and the insiders who are parties to  
24 those settlement agreements.

25 The details in terms of what that discovery

1 would be and the timing to some extent was left for  
2 another day, but it is contemplated by that agreement  
3 that discovery will occur.

4 THE COURT: All right. Does anyone else  
5 wish to speak to the bankruptcy proceedings?

6 (No response)

7 THE COURT: My next question is what is the  
8 status with respect to the parties that elected to go to  
9 mediation?

02:49PM

10 MS. PARKER: As to -- so, there's a number  
11 of parties, your Honor, I'll go through them. As to  
12 ARL, there is a settlement in principal, and I believe  
13 the papers have been signed. That is proceeding apace.

14 As to Inspira, which is a New Jersey clinic,  
15 that mediation is ongoing. As to Liberty, Liberty is  
16 the designer and builder of the clean rooms. Liberty  
17 has opted out of mediation, so the PSC is in the process  
18 of shifting from a mediation interaction with Liberty to  
19 a full-blown litigation posture, and that's in progress  
20 as well.

02:49PM

21 There are two Florida pain clinics that are  
22 participating in mediation. There's a medication  
23 scheduled with those clinics for later this month, and  
24 as to Victory, which is the HVAC company, mediation  
25 briefing is in process, and there's a mediation



1 scheduled for Monday.

2 THE COURT: Thank you. So, does anyone else  
3 want to speak to the mediation process? All right.  
4 That's all very helpful to me in terms of what's going  
5 on. So I have two referrals right now. One is the  
6 motion to stay discovery by St. Thomas. That was filed  
7 in November, and then I also have the PSC motion for  
8 entry of the various protocols and discovery timelines,  
9 which I believe was filed in January.

02:50PM

10 Obviously, the cases have moved on since  
11 then, and there have been a lot of related motions filed  
12 as well, so it seems to me -- I'm going to hear from the  
13 parties, but I'll also have a conversation with  
14 Judge Zobel to see if she's interested in referring more  
15 of the related motions to me so that I can decide them  
16 all at once, or if she doesn't want to, but it seemed to  
17 me for me to decide these issues, it touches on a lot of  
18 the other motions that were filed, and, in particular, I  
19 was thinking the plaintiffs' steering committee had a

02:51PM

20 motion to partially lift the stay, Liberty interests has  
21 filed a motion for a Rule 16.1 conference, Liberty  
22 interests has also filed a motion to lift the discovery,  
23 there are various oppositions to the discovery, and it  
24 goes on from there.

25 They all seem to be related to the need to

1 set a discovery schedule. I also think, and I'm happy  
2 to hear from the parties, that at least the motions that  
3 are before me, in particular, the PSC's motion for entry  
4 of a bellwether trial would allow me to set a discovery  
5 schedule, so I do think a number of the parties have  
6 asked for a formal Rule 16 conference, and I absolutely  
7 agree that is the normal way to proceed.

8           What I would like to also hear from the  
9 parties as we go around the room to discuss a potential  
10 schedule is whether there's any objection to me  
11 considering this to be the Rule 16 conference, and let  
12 me say I understand that a lot of people have not put  
13 forth a proposed framework, so what I was thinking of  
14 doing, and, of course, this may change based on what I  
15 hear today and perhaps during my conversation with  
16 Judge Zobel is that I would like -- the PSC has done a  
17 very nice job of putting charts together for me with the  
18 different variations and proposals.

19           In particular, the three groups that have  
20 put together quite detailed proposals are the PSC, the  
21 St. Thomas related defendants and the Tennessee  
22 defendants, and so on other issues, I've gotten charts  
23 from the PSC that outline what the differences are  
24 between the various proposals, so what I was thinking of  
25 doing was having the PSC put together such a chart and

1 have that filed within a week from today, and then two  
2 weeks thereafter, if anyone else who has not put forward  
3 discovery framework or wants to add anything to file  
4 something two weeks after that, and I was thinking of  
5 limiting it to five pages because I think a lot of the  
6 arguments have been made already.

7 That's not to say there are not other  
8 arguments out there to be made, but I certainly don't  
9 need to have arguments rehashed that have been presented  
02:53PM 10 on the many filings on this topic, and then I would  
11 propose to issue a schedule for discovery and a  
12 framework for the bellwether trials.

13 So I'll hear from the PSC both on their  
14 motion, I know that we've moved on from the  
15 January motion and then also the framework that I  
16 proposed.

17 MS. PARKER: Thank you, your Honor. I  
18 suspect that Judge Zobel will only be too pleased to  
19 refer those additional matters to you given her comments  
02:54PM 20 at the last status conference to the extent that she  
21 dislikes discovery matters. We think that makes a lot  
22 of sense.

23 I'm going to turn things over to my  
24 colleague, Mr. Stranch, to address some of the specifics  
25 there. One thing I would want to stress to the Court is

1 that there's a lot of work that could be done and should  
2 be done in the interim between today's possible Rule 16  
3 conference and a formal setting of discovery that it  
4 sounds like given the timelines we've articulated may  
5 come a month, month and a half down the road.

6 MR. STRANCH: Thank you, your Honor.  
7 Gerard Stranch on behalf of the PSC. I wanted to bring  
8 one thing to the Court's attention. You refer -- you  
9 reference that there were two motions that had been  
10 referred to the Court. There's a third, the deposition  
11 protocol is still outstanding.

12 THE COURT: Yes. I'm sorry I didn't mention  
13 that. That's a curiosity based on the court's docketing  
14 system, and I realize I still need to issue a deposition  
15 protocol, so thank you for raising that.

16 One of the ways we tell whether there are  
17 motions outstanding is there's a little hammer or gavel  
18 next to it, and once we decide it, it goes away. For  
19 some reason, there's no hammer or gavel next to that,  
20 perhaps because I issued the ESI protocol. That may  
21 have cleared it from being on the reminder system, but I  
22 do recognize that I have to issue the deposition  
23 protocol, so thank you.

24 MR. STRANCH: That's good, and the other  
25 thing is, your Honor, we, as the PSC, have no objection

1 to considering this a Rule 16 conference.

2 The guiding light that you're going to hear  
3 from us during this hearing today is going to be we need  
4 discovery to get started so we can get to a trial date  
5 as quickly as possible. Two years have already gone  
6 past. You know, many of our clients were older, to  
7 begin with, and are very sick and have been very sick,  
8 and we'd like those people to have their day in court  
9 before they pass on, your Honor.

02:56PM

10 I'll turn it over to Mr. Chalos who will  
11 address the bellwether selection process and the  
12 schedule that gets us through that process that we've  
13 worked with the defendants on, and if you have any  
14 specific questions about the discovery and that process,  
15 I'd be happy to discuss that with the Court.

16 THE COURT: I do have some actual specific  
17 questions about what was proposed by the PSC. If I  
18 read, and I know there have been various versions of the  
19 proposal, it looked as if in your schedule that you had  
20 a date for the defendants to serve the initial  
21 disclosures but not the plaintiffs, so have plaintiffs  
22 provided initial disclosures, or what is the status, and  
23 also the fact sheets?

02:56PM

24 MR. CHALOS: Right. Well, your Honor, let  
25 me step back, if I may, Mark Chalos on behalf of the

1 plaintiffs. We have over the last 24 hours had two meet  
2 and confer sessions with the St. Thomas Hospital  
3 defendants, which includes the Ascension parties and the  
4 St. Thomas Clinic defendants. We had a lengthy phone  
5 call last night and an in-person meeting today.

6 We were able to make substantial progress, I  
7 think, on a number of the issues that were raised in the  
8 pleadings, the motions and the responses and the  
9 supplements thereto.

02:57PM

10 We have some issues that we have not come to  
11 a full agreement on yet. I think we can probably work  
12 through those, and then there are going to be probably  
13 at least one big issue that we're going to need your  
14 Honor's guidance on, so with your Honor's permission,  
15 I'd like to run through a few of the areas where we do  
16 have agreement, and then we can talk about the areas  
17 where we will probably come to agreement, and then we  
18 can talk about the area where we'll probably need your  
19 Honor's guidance and ruling.

02:57PM

20 We have, and this is not intended to be the  
21 entire universe of areas where we do have agreement, but  
22 we do have an agreement that both the defendants and the  
23 PSC will serve initial disclosures related to common  
24 issues within 20 days of your Honor's entering an order.

25 Given your Honor's suggestion that there's

1 going to be some further filings, we would like to do  
2 that within 20 days of today, and we don't have an  
3 agreement yet on that, but we'd ask your Honor to order  
4 that the defendants, the St. Thomas defendants, the  
5 clinic defendants and the PSC to serve initial  
6 disclosures within 20 days of the hearing today.

7 We have agreed on some presumptive limits  
8 for in terms of numbers for requests for admissions,  
9 interrogatories and requests for production. Those are  
10 200 for requests for admissions, 40 for interrogatories,  
11 100 for requests for production, and the defendants have  
12 agreed that they would answer the outstanding  
13 interrogatories irrespective of the presumptive limits  
14 that we've agreed on.

15 We've also agreed that the privilege logs  
16 would be produced no later than 30 days after  
17 substantial completion of production of responsive  
18 documents. We've agreed that there is a deadline for  
19 amending complaints and joining new parties relating to  
20 common issues of 60 days after the completion of common  
21 fact discovery, and that includes amendments and joinder  
22 of new parties related to common issues.

23 We have also discussed a bellwether  
24 selection process that would include, and it's something  
25 like what the plaintiffs propose, although it includes

1 some features that we didn't actually propose, and what  
2 it would include is designating a category, and this  
3 would run in parallel with the common fact discovery.

4 At some point after the plaintiff profile  
5 forms were produced to the defendants, along with  
6 medical records authorizations and other records  
7 authorizations your Honor has already approved, the  
8 parties would each propose some number of cases between  
9 10 and 15 that would total, you know, somewhere 20 to  
10 30.

03:00PM

11 Now we don't have an exact yet agreement on  
12 whether it's 10 or 15 or somewhere in between, and we're  
13 going to continue to discuss that, and for that group of  
14 cases, between 20 and 30, there would be some limited  
15 case specific discovery, and we had discussed doing  
16 depositions of the plaintiffs, you know, the injured  
17 person, and then if there's a loss of consortium claim,  
18 the spouse and possibly the treating physicians, but it  
19 would be some limited number of depositions, and in

03:00PM

20 those cases, those plaintiffs would not be ordinarily  
21 subject to a second deposition later, but there would be  
22 a limited -- for that pool, the initial trial pool or  
23 potential trial case pool, there would be some limited  
24 discovery, and then at some point after that discovery  
25 was concluded, the parties would select or propose some



1 smaller number of cases that would then serve as the  
2 bellwether trial pegs.

3 In other words, we'd create a discovery pool  
4 where there would be some limited discovery, and out of  
5 that pool, the parties would each propose some number of  
6 cases for a bellwether trial, and a feature of that plan  
7 would include some number of strikes that each side  
8 would have to strike one or two of the other side's  
9 proposed picks, with the notion being that of that  
03:01PM 10 group, we would get the bellwether cases that would  
11 proceed to trial.

12 In the area where there is still some  
13 disagreement, but I think it's something we can probably  
14 work through, is the schedule for common expert  
15 discovery. The St. Thomas Hospital defendants have  
16 proposed a schedule whereby the experts, the parties  
17 would disclose their reports, then the expert would be  
18 deposed, then the defendants would produce their  
19 reports, and then those experts would be deposed, and  
03:02PM 20 then the plaintiffs would have rebuttal experts, and  
21 then they'd give their reports, then they'd be deposed.

22 That's the St. Thomas Hospital's proposal.  
23 Our proposal is that the reports are done, all three  
24 sets of reports, then depositions would occur of those  
25 experts so to avoid having more than one deposition of

1 given expert if that expert gives rebuttal reports --  
2 rebuttal opinions.

3 I understand that, and I'm sure they will  
4 speak for themselves, but I understand that the  
5 St. Thomas Clinic defendants think there ought not be  
6 any rebuttal reports, period. That's an area we are  
7 still working on. We may need your Honor's guidance on  
8 that, we may not.

9 Then the issue on which I think we'll  
03:02PM 10 probably need your Honor's ruling is where we're headed  
11 with this and what the end point is. We, the PSC,  
12 believe that, as our schedule delineates, that we can  
13 move these cases to a trial in 2015, that we can be  
14 ready for trial in August or September of 2015.

15 We have in the spirit of compromise  
16 discussed moving that date back to something that we  
17 could all live with, and we had talked about March of  
18 2016, February or March, and we've agreed with the  
19 St. Thomas Hospital defendants that March of 2016 seems  
03:03PM 20 like a reasonable end point as an aspirational goal.

21 We understand that your Honor may not today  
22 be able to peg it to a particular date, given  
23 Judge Zobel's calendar and other unknowns, but with a  
24 target date I think we can then fill in some of the  
25 other deadlines and agree on those. I don't think we're

1 going to have trouble agreeing on intermediate deadlines  
2 if we know where we're shooting for.

3 We think leaving it open-ended is not in the  
4 interests of justice. I think these folks have been  
5 injured now two years ago, they are still suffering,  
6 and, you know, pushing it into '16 is probably longer  
7 than we'd like, but beyond that I think serves a real  
8 injustice to our clients and also to the defendants,  
9 who, I'm sure, want a resolution as well.

03:04PM

10 I understand that the St. Thomas Clinic  
11 defendants think that these cases cannot be tried until  
12 February or March of 2017. That's a position we  
13 disagree with. We think that's unreasonable, and while  
14 we think we can do it in '15, we'd be willing to agree  
15 for the sake of compromise to start in February or  
16 March of '16, and we have an agreement with St. Thomas  
17 Hospital defendants on that issue.

03:04PM

18 We don't have an agreement with the  
19 St. Thomas Clinic defendants on that issue, so we think  
20 we'll probably need your Honor's guidance on that,  
21 recognizing that it's our position that we can do it in  
22 '15. We'll have to work hard, and it can be done in  
23 that.

24 So what we would propose then, your Honor,  
25 is, you know, given those issues, we could put together

1 a -- and we have, St. Thomas Hospital lawyers went and  
2 after our meet and confer session this morning went and  
3 created a redline of their order that reflects a number  
4 of these agreements, and we think we're pretty close on  
5 this.

6 We'd like to spend a little more time with  
7 it, and we can submit to your Honor certainly with the  
8 St. Thomas Hospital defendants a joint proposal if there  
9 remains any area of disagreement, for example, with the  
10 common expert discovery schedule, we can outline our  
11 various positions there and ask your Honor to rule on  
12 that.

13 I don't know, given the position I've just  
14 learned about 30 minutes ago or less that St. Thomas  
15 Clinic thinks that we need another two years, two and a  
16 half years before we can get to the first trial, I don't  
17 know that they're going to participate in that joint  
18 submission.

19 They may have to submit their own and  
20 explain why we need to wait four and a half years after  
21 the outbreak before Trial Number 1. With that said, I  
22 think that's at least for the St. Thomas Hospital  
23 defendants, we can submit a joint proposed order that  
24 may have some disagreement but would be largely agreed  
25 upon, and we can do that within a week.

1 THE COURT: So that's all welcome that you  
2 have done so much work and agreed on many areas. Are  
3 you proposing this framework to apply just to the  
4 St. Thomas -- I may have captured that wrong, but the  
5 St. Thomas defendants and the Tennessee defendants,  
6 because obviously we have other groups of defendants?

7 MR. CHALOS: Right. Yes, your Honor, our  
8 notion is that this order would serve as a framework  
9 specifically for the St. Thomas defendants. There are  
10 other clinics where they had a number of patients died  
11 or suffered serious injury, so, and those are Virginia  
12 and Michigan and New Jersey and Florida. They may need  
13 their own orders in those cases.

14 THE COURT: It sounds as if I would need to  
15 convene a separate Rule 16 conference, I mean, if  
16 Judge Zobel would like me to do that, that a separate  
17 Rule 16 conference would need to be convened for those  
18 clinics?

19 MR. CHALOS: I think so, and we don't know  
20 to what extent those cases will be resolved, and I  
21 understand there may or may not be discussions with  
22 groups, I don't want to disclose anything confidential,  
23 but you may or may not have to do that, I guess.

24 THE COURT: What is your view with respect  
25 to what are the so-called national defendants?

03:06PM

03:06PM

1 MR. CHALOS: Well, the schedule as we've  
2 proposed it and in particular the schedule that we're  
3 now coming to some agreement with the St. Thomas  
4 Hospital defendants on would allow for those defendants  
5 to decide whether they're going to continue mediating  
6 and resolve the claims against them or they're going to  
7 get into litigation, and if they're in litigation, some  
8 of these cases also named them as parties, so to the  
9 extent there are any remaining national defendants, they  
10 would be subject to, you know, these deadlines, and  
11 they'd be part of these cases.

03:07PM

12 Now, it remains to be seen how many of those  
13 will still be in the case. You know, the bankruptcy  
14 settlement will resolve the claims against a majority, a  
15 vast majority of the national defendants. We've  
16 resolved through mediation some of the other defendants,  
17 claims against some of the other defendants, but, yeah,  
18 they would be subject to this, and, you know, if they  
19 for some reason felt -- well, let me back up. They have  
20 an opportunity now through the MDL courts, mediation  
21 program to resolve the claims.

03:08PM

22 If they choose not to, then, you know, we  
23 have to go to trial, and we shouldn't wait any longer,  
24 and we've already waited two years, and we shouldn't  
25 wait any longer because they can't decide to settle or

1 not settle. Everybody has been aware of this litigation  
2 for two years. They say they are just now parties, but  
3 we know they hired lawyers two years ago, so we think we  
4 ought to move forward and not delay because there's a  
5 possibility there may be additional defendants.

6 MS. PARKER: If I may, your Honor.

7 THE COURT: Yes.

8 MS. PARKER: I agree with Mr. Chalos, the  
9 framework that we have set forward we expect will be a  
03:08PM 10 helpful reference point for talking about the scheduling  
11 with other defendants. There are certainly other  
12 defendants out there who, in particular, I'm thinking of  
13 Liberty who is trying to aggressively push for  
14 discovery.

15 I don't see counsel for Liberty in the  
16 courtroom today. I'm sure they want to be heard on  
17 these subjects, so while we think this plan will be  
18 helpful as perhaps a benchmark or sample, I think we  
19 want to make sure all defendants are heard from on these  
03:09PM 20 issues.

21 I wouldn't want to paint all of the  
22 defendants with this particular Tennessee centric brush.  
23 That said, we do think it would be a mistake at this  
24 point in time to wait to address some of these Tennessee  
25 issues on which there has been meeting and conferring

1 and agreement and some forward progress until all other  
2 defendants could come into this court and comment on  
3 what they would like their discovery plans to be.

4 THE COURT: Have the plaintiffs provided  
5 completed fact sheets?

6 MS. PARKER: We have not, your Honor. It  
7 occurred to me that it might actually be helpful to  
8 describe for you what discovery has been done so far to  
9 give you sort of the broader framework.

03:10PM 10 THE COURT: Yes.

11 MS. PARKER: So as of now, all defendants in  
12 the MDL have been provided the opportunity to access the  
13 document repository that contains all formal discovery  
14 produced so far in the MDL. That includes primarily  
15 documents that were produced by clinics and doctors in  
16 response to subpoenas served by the PSC early on. It  
17 also includes materials that were informally produced by  
18 the trustee from NECC's files. I believe the last  
19 figure Mr. Fern gave us at the status conference was  
03:10PM 20 that there were about 44,000 pages of documents that had  
21 been informally produced by NECC.

22 The PSC has also provided access to --  
23 produced, we've formally produced it, the PSC formally  
24 produced materials relating to our original inspection  
25 of the NECC facility back in December of 2012. Those



1 materials include some testing results from sampling the  
2 PSC had done at that time as well as other materials  
3 relating to that inspection process.

4 The PSC is in the process of producing still  
5 photographs that were taken during that inspection. The  
6 PSC has already provided access to video footage that  
7 was taken by the PSC during that inspection.

8 The St. Thomas Clinics have served at least  
9 three third-party subpoenas. I believe responses,  
03:11PM 10 productions in response to those subpoenas has started  
11 to occur, and in terms of the fact sheet, your Honor,  
12 you may see on the docket today shortly before court,  
13 the PSC actually formally filed the fact sheet and the  
14 releases that this Court had agreed upon.

15 As a formal matter, those had not been  
16 docketed for the information of all plaintiffs' counsel  
17 out there. They had, however, been produced to counsel  
18 in Tennessee, counsel who represented Tennessee victims  
19 a long time ago, and counsel in Tennessee, as I'm sure  
03:12PM 20 Mr. Chalos and Mr. Stranch can speak to, are aware that  
21 those fact sheets will need to be completed soon.

22 THE COURT: As well as the authorizations.

23 MS. PARKER: As well as the authorizations  
24 and releases, and one final point of discovery, NECC  
25 made the NECC facility available to defendants in this

1 action recently for additional inspections, so, for  
2 example, I know that defendant Unifirst and defendant  
3 InSight, which is a Virginia clinic that is relatively  
4 new to the MDL, conducted inspections of the facility  
5 yesterday.

6 THE COURT: All right. Thank you.

7 MR. CHALOS: With respect to the plaintiff  
8 profile form, we have in our contemplation and in an  
9 agreement with I think both sets of St. Thomas  
10 defendants that the plaintiffs would provide those 60  
11 days, no later than 60 days after your Honor enters a  
12 scheduling order.

13 We also had some discussions that we would  
14 provide those on a rolling basis and we wouldn't  
15 necessarily wait 60 days to dump all of those at once.  
16 We have agreed to encourage the plaintiffs' lawyers to  
17 get them done as soon as possible, and I know many have  
18 them started, or at least some of them have started that  
19 process, for example, my firm has, Mr. Stranch's firm  
20 has and some other firms have, so we don't intend to  
21 wait the full 60 days to provide completed clinic  
22 profile forms and medical authorizations.

23 That statement or those agreements are made  
24 with the understanding that we would be moving toward,  
25 you know, completing both common fact discovery and case

1 specific fact discovery for a smaller group of cases and  
2 do so with the idea of getting to a reasonable trial  
3 date, so we stand ready to honor that, and we will  
4 continue to prepare those plaintiff profile forms and  
5 get the medical authorizations signed on a rolling basis  
6 short of this 60-day deadline that would begin to run  
7 when your Honor enters her order or sooner if your Honor  
8 decides that we want to start that clock running today,  
9 we stand ready to comply with that.

03:14PM

10 MR. STRANCH: If the Court would like to get  
11 that and discovery started today, we stand ready,  
12 willing and able to do that. I know most of the firms  
13 that have a large number of cases in Tennessee have  
14 already -- are well underway with getting the plaintiff  
15 profile forms completed, and so we're ready, willing and  
16 able to go forward. We'd like full discovery to go  
17 forward on the common issues as quickly as possible.

18 MR. BRACERAS: Your Honor, if I may, on  
19 behalf of Unifirst?

03:14PM

20 THE COURT: Yes.

21 MR. BRACERAS: Thank you. My client would  
22 certainly be pretty happy to be such an afterthought in  
23 this case, and we're happy to continue that roll of  
24 being an afterthought, especially, you know, perhaps  
25 we're not going to be a defendant in the Tennessee cases

1 at all, but just to update your Honor on where we stand,  
2 we are looking to mediate the case in October, and we  
3 have dates to do that in October, and we have a motion  
4 to dismiss that's still pending that plaintiffs haven't  
5 responded to.

6 While we have this mediation outstanding,  
7 we've agreed to stay discovery, but we still, we  
8 believe, need to be a part of this discussion in the  
9 event that mediation is either not successful or also,  
03:15PM 10 as your Honor is probably aware, in the bankruptcy  
11 proceedings if the bankruptcy court is unwilling or  
12 unable to issue releases that would cover all potential  
13 possible claimants, and that's a real issue that the  
14 Bankruptcy Judge really left open.

15 Even though he approved the settlement  
16 amounts, he made very clear that he was only addressing  
17 the settlement amounts and the approval of the plan, and  
18 whether he actually would authorize releases that went  
19 to nondebtors is a question for another day, and that  
03:16PM 20 will be addressed during the approval of the plan, and  
21 the trustee, I believe, committed to providing a draft  
22 of the plan in August, but, still, by the time that plan  
23 is actually submitted, imbedded and the Bankruptcy Judge  
24 actually rules on whether to issue injunctions that  
25 would authorize releases of nondebtor parties is

1 certainly an open question.

2 So for all the defendants, not just  
3 Unifirst, there's a question as to whether, even if  
4 mediation is successful in terms of reaching an amount,  
5 whether it would be successful in obtaining an actual  
6 settlement that would gain the releases that would be  
7 the necessary consideration for any settlement.

8 So while we have committed to the mediation  
9 in October, it's still a very real possibility that we  
03:17PM 10 will be continuing to litigate this case, and I believe  
11 when we appeared before your Honor some months ago, it  
12 may have been my suggestion that there are a number of  
13 parties mediating, let's wait to see where those go, and  
14 then we can get back together.

15 We're not suggesting that we not engage in  
16 common discovery. It seems like a good idea to engage  
17 in common discovery while the mediations are going on,  
18 but we were not invited to this meet and confer, so  
19 certainly we would need to have that input. Some of the  
03:17PM 20 suggestions by counsel seem reasonable, and they're  
21 consistent with much of what we argued in our bellwether  
22 briefing long ago, but a central point that is being  
23 completely overlooked here is that this is an MDL that  
24 is a nationwide MDL, this is not a Tennessee MDL, and  
25 the bellwether process, and we've cited to some of the

1 leading works and authorities on bellwether trials, and  
2 I'll refer your Honor to the Judge Fallon piece in the  
3 *Tulane Law Review*, which is really the leading piece on  
4 this, and he conducted some MDLs on this. I have extra  
5 copies if the Court would like.

6 THE COURT: I've actually read it.

7 MR. BRACERAS: You've read it?

8 THE COURT: Yes, a number of parties had  
9 cited to it, so it was very useful.

03:18PM 10 MR. BRACERAS: So, your Honor is probably  
11 familiar, our proposal really tracks Judge Fallon. We  
12 weren't that creative. We more or less tracked  
13 Judge Fallon's suggestions, both in timing and in the  
14 amount of cases to select, but what plaintiffs here  
15 today are focusing on are just Tennessee, and what  
16 Judge Fallon emphasizes throughout his piece, and it's a  
17 central aspect of an MDL, otherwise you wouldn't have an  
18 MDL in the first place. It has to be represented.

19 A bellwether trial is worth nothing if it's  
03:19PM 20 not representative, so that's why Judge Fallon goes  
21 through all the different categories that you have to  
22 collect information on, and there's such a difficult  
23 process of the parties selecting maybe 20 cases each.

24 Our proposal, frankly, was to involve the  
25 Court more in that selection process so that you don't

1 have each side proposing 20 outliers that are not as  
2 represented. What needs to be done here if we are going  
3 to talk about the bellwether process right now is a  
4 process that would apply to all of the cases in all of  
5 the MDLs.

6 Now, we think that it's perfectly  
7 appropriate to start talking about common discovery.  
8 Frankly, I don't have an objection to considering this a  
9 Rule 16 conference, and we can talk about, just like we  
10 could any routine civil litigation before your Honor, we  
11 could start talking about deadlines for written  
12 discovery, for common discovery, for the plaintiff fact  
13 sheets, for executing the medical releases, but until  
14 we -- if we're going to start talking about the  
15 bellwether process, we need all of the other defendants  
16 involved as well, and we need to talk about other  
17 jurisdictions because to be truly representative, we  
18 need to be representative of Indiana, Michigan.

19 Before I left for the court today, we  
20 received five brand new filings from Indiana. So, while  
21 counsel says, you know, understandably, and you would  
22 expect plaintiff's counsel to talk about it's been two  
23 years since the date of the injury, and he also  
24 referenced that Unifirst was brought into this case in  
25 January.

1           We continue to be brought into new cases  
2 every day, including four new cases or five new cases  
3 just this afternoon after lunch, so for us to engage in  
4 an MDL, it has to capture all of the jurisdictions, all  
5 of the cases. The bellwether process has to be  
6 represented, not just of a select clinic in Tennessee.

7           So I'm happy to go forward, your Honor, and  
8 discuss other aspects of common discovery in some of  
9 what we would suggest, even in terms of common  
03:21PM 10 discovery, frankly, I think a trial -- and, again, we  
11 weren't invited, we weren't part of the meet and confer.

12           We think a trial in early 2016 is  
13 aggressive, if not unrealistic. If you just think of  
14 all the different stages of common discovery, then after  
15 common discovery, and your Honor is familiar with all  
16 we're talking about the written discovery, we're talking  
17 about completing the plaintiff profile sheets, we're  
18 talking about executing the medical releases and just  
19 collecting those medical records, which would all have  
03:21PM 20 to come before the ultimate selection and proposal of 20  
21 cases per side, and then I would suggest the Court's  
22 role between those 40 cases, selecting the 20 most  
23 representative of those 40 cases, then we're talking  
24 about depositions, and there would be many depositions,  
25 not only of the national defendants, but in common



1 discovery, it would be of the clinic defendants and  
2 other parties as well.

3 Then after all that common discovery is  
4 involved, then you have the selection of the bellwether  
5 process. You have the expert selection -- I'm sorry, I  
6 would have forgotten about the expert discovery. That's  
7 usually about 18 months going up to summary judgment, as  
8 your Honor is familiar.

9 If we were to do that, 18 months here, then  
03:22PM 10 you get into the selection process, then you take the  
11 case specific discovery, which plaintiffs have suggested  
12 and we agree would have to go in. One thing plaintiffs  
13 didn't indicate is each case would then be subjected to  
14 a summary judgment process. By the time -- that would  
15 take you beyond 2016 is all I'm saying.

16 Now, I don't know if we have to set -- we're  
17 not here to argue about what the trial date is because  
18 it's so far out, it might not be worth our time right  
19 now. In a way, I think we can get started, just get  
03:23PM 20 engaged in common discovery. We'll be back before your  
21 Honor, whether it's every month or every couple of  
22 months, and we can talk about the end dates down the  
23 road.

24 I don't know if we have to spend much time  
25 arguing whether, you know, June, 2017 or February, 2017

1 or June, 2016 is the most realistic. I'm just sharing  
2 my experience from other, you know, more straightforward  
3 single civil cases in this district, which are much  
4 longer than a February, 2016 trial would permit, but  
5 what we would suggest is that we could start common  
6 discovery, which would involve written discovery, to  
7 begin with. We haven't considered plaintiffs' limits on  
8 that written discovery. We heard it for the first time  
9 here, but we obviously would be open to consider  
10 whatever limits there are.

03:24PM

11 While we're starting with that written  
12 discovery, the plaintiffs could complete the fact sheets  
13 and the medical authorizations. Once we got those in,  
14 then we could start collecting medical records, we'll be  
15 back before your Honor, and we can, you know, report  
16 where we are, whether it's three months down the road  
17 after we get the releases and we get the written  
18 discovery going, and we could talk about other deadlines  
19 beyond that, then, again, you're talking about the  
20 depositions after the written discovery, then you're  
21 talking about expert selection.

03:24PM

22 I just envision, just thinking about all the  
23 events that have to occur, that that in itself is  
24 probably an 18-month process before we even get to  
25 selecting what are the 20 bellwether cases for

1 case-specific discovery.

2 THE COURT: So that's helpful, Mr. Braceras,  
3 and what about the framework that I had -- I know you  
4 said you didn't object to this being a Rule 16  
5 conference but then providing I know you, in particular,  
6 your client, has not had the ability to comment on the  
7 proposed schedule. I know you had asked for a Rule 16  
8 conference, I believe.

9 MR. BRACERAS: I thought your Honor's  
03:25PM 10 suggestion was fine, in terms of submitting it, then  
11 giving us two weeks after that to respond. I think  
12 that's fine. Again, I would repeat, trying to target a  
13 trial date might not be the most productive thing at  
14 this stage of the litigation, just because there's so  
15 many steps and so many cases to go forward with,  
16 especially while we continue to get new cases filed  
17 every day, but I certainly think the preliminary steps  
18 for common discovery, that, absolutely, we should  
19 submit, as your Honor suggested, a draft discovery  
03:26PM 20 schedule to which we can respond.

21 THE COURT: All right.

22 MS. GREER: Your Honor, if I may, on behalf  
23 of the St. Thomas entities and the Ascension parties?

24 THE COURT: Yes.

25 MS. GREER: We did not intend to co-opt the

1 discovery process, we were simply dealing with the  
2 problem that was presented to us of outstanding  
3 discovery that we have already responded to. We have  
4 started some production, et cetera, and we agree that  
5 this schedule is extremely ambitious and very  
6 aggressive, and everything is going to have to break  
7 just right for it to stay on course, including getting  
8 the fact sheets, the authorizations timely, including  
9 the third parties who own these documents, producing  
10 them to us timely including, you know, getting some  
11 resolution fairly quickly on the lift stay issues that  
12 are outstanding, so there are a number of contingencies  
13 that we recognize need to occur for this to stay on  
14 track, and we want to be very, very clear about that.

03:26PM

15 We don't think that the 2017 dates that are  
16 being proposed by our co-defendants are unreasonable.  
17 They're probably much more realistic, but we are trying  
18 to be clear to the Court that we are trying to move this  
19 case forward, but I do want to speak to the discovery  
20 that we have only recently received because it sounds  
21 like we have all these barrels of discovery. That's  
22 been in the last few weeks, frankly.

03:27PM

23 The repository was not available to us.  
24 There was some resistance to that ahead of time, and  
25 there were issues over the access fees. Those have only

1 recently been resolved, and we have not yet seen any of  
2 those documents, but we are moving forward to do that.

3 The inspection was last week. We were given  
4 dates by the trustee. We had to get people up here, get  
5 experts up here on a very, very expedited basis. We  
6 were not given the video before the inspection. We just  
7 received it. We were not given many of the documents  
8 before the inspection. I think there may have been some  
9 fire wall issues, but we had to kind of go in basically  
03:27PM 10 blind to the inspection, which, again, was last week, so  
11 we are just now getting a lot of these documents.

12 I want to be very clear about the  
13 authorizations that we received at the time of suit, and  
14 your Honor has addressed this issue before. Those were  
15 limited authorizations. They were not the kind of thing  
16 that we need for the bellwether cases.

17 We need those urgently, so we are trying to  
18 compromise. We're trying to move these cases forward.  
19 We certainly did not intend to bind anyone, and if the  
03:28PM 20 Court prefers to do a bellwether, I mean, excuse me, a  
21 discovery plan that involves everyone, we're open to  
22 whatever suggestions.

23 We're just trying to kind of get ourselves  
24 into a position because right now the PSC has been  
25 taking the position since we got in the case that we're

1 open season for discovery, that there are no limits in  
2 place, and we've been asking, as the Court knows, since  
3 October that something be put in place, so we are open  
4 to working together, and we have no objection to the  
5 Rule 16 conference and your proposal.

6 THE COURT: All right.

7 MR. GIDEON: Your Honor, C.J. Gideon on  
8 behalf of the St. Thomas Clinic defendants. First, I'd  
9 like to make it clear that we fully accept the Court's  
10 invitation to treat this as a Rule 16 conference.

03:29PM

11 We also invite the Court to expand your role  
12 to preside over a discovery schedule. I want to  
13 apologize to counsel for Unifirst, we should have  
14 included them, and we didn't simply because there has  
15 been so much pressure placed on us to respond to what we  
16 thought would be a completely unrealistic schedule  
17 proposed by the PSC.

18 We are sensitive to the individuals who  
19 received this product. We do not wish to delay their  
20 day in court, but we are also interested in making sure  
21 that the process leads to thorough preparation for  
22 trial, which is one of the explicit purposes behind  
23 Rule 16.

03:29PM

24 How did we get to March of 2017? May I just  
25 outline that for you. Assuming that your Honor entered

1 an order on August 1st beginning the organized process  
2 of common discovery, and I join with counsel for  
3 Unifirst, and I join with what Ms. Greer just said, we  
4 have allocated 270 days to complete all of the common  
5 discovery, and in many respects, it is an unknown as to  
6 how many depositions and how many people must be  
7 contacted in that process.

03:30PM 8 Let me give you an idea. While we did  
9 recently receive access to the 40,000 documents in a  
10 database produced by the trustee to the PSC, which  
11 they've had a long time, counsel for NECC, Harris Beach,  
12 and I'm sure staffed with a number of talented people  
13 had 28 lawyers responding to these informal requests in  
14 the second quarter of 2013 at a cost of \$466,000. In  
15 the final quarter of 2013, they had 22 lawyers tasked  
16 with responding to those requests. Total cost,  
17 approximately \$700,000.

18 Some lawyers are better than others, but  
19 that tells me that those 40,000 documents are going to  
03:31PM 20 take some time to evaluate and assess. The 270 days  
21 we've allocated for common discovery is inclusive of all  
22 of the common discovery: ARL, Unifirst, NECC, Medical  
23 Sales Management. We think that's ambitious.

24 Then we allocated a period of 270 days for  
25 the process of expert disclosures and depositions of all

1 those experts. To give you an example of how  
2 unrealistic the PSC has been in their initial proposal,  
3 which I hope they shared with you, after the third round  
4 of disclosures with their rebuttal experts being made on  
5 May 28th, 2015, we are going to, according to them,  
6 complete all of the depositions of all the experts by  
7 June 20th. That's not going to happen.

8 If your Honor orders it, we'll do our best,  
9 but it's just not realistic, so we ultimately allow 60  
03:32PM 10 days in between the completion of common discovery and  
11 the completion of the common expert discovery to look  
12 into and implement a Tennessee-specific mediation, which  
13 we've proposed long ago, discussed informally on a few  
14 occasions, and then we get into the case specific  
15 discovery, total of 16 cases, all that discovery done in  
16 270 days. That would take us to January to March of  
17 2017.

18 I respectfully suggest that is not  
19 unrealistic. It doesn't deny anyone justice, but it  
03:32PM 20 assures that the cases that are tried are tried on an  
21 informed basis.

22 A couple of additional points to mention,  
23 I'm sensitive to what is frequently repeated by the PSC  
24 that the defendants are not cooperating, are not moving  
25 this case along quickly enough. The completed fact



1 sheet was approved by this Court, I believe, on  
2 February 14th. It has existed in its final form now for  
3 five months. We haven't received a single one. Last  
4 night we suggested in the meet and confer, surely you  
5 can get this done in less than 60 days.

6 Well, part of this 270 days we've allocated  
7 is because they were unwilling to do that last night, 60  
8 full days to send us sheets that were approved since  
9 February of this year. It is correct, we did have an  
10 opportunity to inspect the NECC facility for the first  
11 time on July 9th, this month, and we were given two days  
12 to choose from. We were there on the second day, and we  
13 were told we had to do it in three hours.

14 We had indeed issued some third-party  
15 subpoenas, and those have been responded to, but the  
16 point is we understand that there are a number of  
17 unknowns taking into consideration past experience. We  
18 believe we can get all of this done in a sensible  
19 fashion in what appears to be a long time, but when you  
20 parse out section by section, it is not.

21 The last thing I'd like to say is this. It  
22 is perhaps easy for us, as the Tennessee defendants, not  
23 to be mindful of the fact that this is an MDL.  
24 According to the October 24, 2013 publication by the  
25 CDC, there are 91 cases, 91 people infected in Indiana

1 with a two-year statute of limitations, 239 in Michigan,  
2 151 in Tennessee, 54 in Virginia, 12 in Minnesota, 50 in  
3 New Jersey, 18 in North Carolina, 20 in Ohio. Virginia  
4 and Tennessee, one-year statutes of limitation, but the  
5 commentary made by counsel for Unifirst is certainly on  
6 target, and that is I would expect in addition to the  
7 recent addition of a number of cases from Virginia, your  
8 Honor will also be dealing with cases from Indiana, from  
9 Michigan, Florida, which has 25 infected individuals,  
10 and the net result will be while it's okay for me to  
11 ignore discovery of Unifirst and discovery of NECC and  
12 ARL, the fact of the matter is that by doing that, it  
13 guarantees that the Michigan defendants and the  
14 New Jersey defendants and the Maryland defendants, the  
15 North Carolina defendants, the Ohio defendants will want  
16 to do the same thing.

03:35PM

17 They won't necessarily be satisfied with the  
18 work we do, so while I recognize he's right from the  
19 Tennessee standpoint alone, I have as much interest as  
20 the people ahead of me in getting the discovery done, I  
21 want to make sure it's done correctly, and I want to  
22 have the time to prepare it, to prepare for it, to do it  
23 well. Thank you.

03:35PM

24 THE COURT: Yes, you're from Liberty,  
25 representing Liberty?

1 MS. RICARDO: Yes.

2 THE COURT: Representing Liberty, yes.

3 MS. RICARDO: Good afternoon, your Honor,  
4 Dianne Ricardo for Defendant Liberty Industries. I  
5 apologize for not getting a spot at the table. I would  
6 like to say that Liberty agrees that this be considered  
7 a Rule 16 conference. We did file a motion looking for  
8 such a conference.

9 I do agree with my Sister, Kristen Johnson  
03:36PM 10 Parker, that Liberty would like an opportunity to weigh  
11 in on the timing and the framework of discovery. We  
12 certainly are interested in moving ahead with discovery  
13 and moving towards a speedy trial, so we are certainly  
14 on board with moving that process along.

15 We do not wish to create any kind of delay  
16 or anything of that nature, naturally. We do have a  
17 pending motion on our motion to lift the discovery stay  
18 of affiliated defendants. A ruling on that motion will  
19 have an impact on the discovery that we're able to seek,  
03:37PM 20 so we do look for the Court's direction in that regard.

21 It is correct that we also, Liberty, had  
22 access to the trustee's document production of  
23 approximately 40,000 documents. I would like to clarify  
24 for the Court that that was in connection with the  
25 mediation, and, therefore, those documents are

1 confidential, they are not admissible in court, and they  
2 need to be returned unless the parties are able to reach  
3 an agreement.

4 I can state that Liberty has sought such an  
5 agreement from the trustee. We have been unable to  
6 reach an agreement. The trustee has insisted on a  
7 return of those documents and that they be re-requested  
8 and then they will be reproduced. That may be the  
9 subject of another motion on another day, but we do look  
03:38PM 10 for the Court's guidance in what discovery we're able to  
11 obtain and when, and just further to the point of input  
12 on the schedule, similarly, we did not have an  
13 opportunity to meet and confer, and it may be that  
14 one-size-fits-all, but it is difficult to make that  
15 determination.

16 For Liberty, there are fewer cases against  
17 Liberty than against some other defendants. Liberty,  
18 although referred to as a national defendant is a very  
19 small company in Connecticut. There's only -- I would  
03:38PM 20 say there's less than 50 cases at this time filed  
21 against Liberty, so it may be that the schedule that  
22 works best for defendants facing a multitude of  
23 lawsuits, Liberty may not require as much time for  
24 discovery. Thank you.

25 THE COURT: All right. Thank you. Anyone

1 else in the gallery that wants to speak? All right. It  
2 looks like the PSC wanted to say something further.

3 MR. CHALOS: Your Honor, briefly, two points  
4 I want to raise with respect to this notion of other  
5 states and clinics in other states. I think there are  
6 really two issues there. One, through the hundreds of  
7 pages of briefing, I don't see a serious suggestion that  
8 there should be one bellwether process that encompasses  
9 all of the states and all of the clinics. That's  
03:39PM 10 unworkable and really doesn't help very much.

11 The liability of St. Thomas and those  
12 entities under Tennessee law will not tell us very much  
13 about Virginia and Ohio and Indiana and what have you,  
14 so I think, Number 1, there has to be a state-by-state  
15 bellwether process, I think, in order to yield any  
16 information that would be valuable to any of the clinic  
17 defendants in terms of evaluating the cases and the  
18 plaintiffs.

19 The second issue is whether we should wait  
03:39PM 20 and do no common discovery until the last statute of  
21 limitation has run and the last state of the 20 states  
22 that are potentially impacted in this.

23 THE COURT: I don't actually hear anyone  
24 suggesting that.

25 MR. CHALOS: Well, I don't know if they are

1 overtly suggesting it, but certainly that's their logic  
2 in that until you know the entire universe of the MDL,  
3 you can't possibly do a bellwether selection process. I  
4 think that's what these guys are saying.

5 THE COURT: I think I heard everyone say  
6 they were interested in common discovery starting now, I  
7 mean, unless I misheard things.

8 MR. CHALOS: Let me finish my point. So  
9 there is no reason to wait any longer to start certain  
03:40PM 10 common discovery and case specific discovery. We ought  
11 to just move toward a trial.

12 THE COURT: I mean, my only purpose and  
13 because, unfortunately, it has dragged on, and it's a  
14 relatively recent referral to me. What I'd like to do  
15 and why I'd like to talk to Judge Zobel is that there  
16 are a number of motions, like I said, in the beginning  
17 that are not referred to me that impact this decision,  
18 and what I'd like to do if it's okay with Judge Zobel,  
19 and she may have very different ideas, is try and deal  
03:41PM 20 with it all at once, so that's why I'd like to set the  
21 framework of giving anyone else who hasn't had the  
22 opportunity to respond with the hope that I can set  
23 forth a framework for common discovery, at the least,  
24 for everybody. That is my goal. I don't know if I'll  
25 get there, but that's what I'm trying to do.

1 MR. STRANCH: Your Honor --

2 THE COURT: Yes.

3 MR. STRANCH: -- I have a proposal for how  
4 we should move forward from here based on what I'm  
5 hearing the Court saying and what I'm hearing from the  
6 parties in the courtroom today. I think if we get an  
7 order today from the Court, from the bench or something  
8 in writing that says the 60 days starts running on the  
9 plaintiff profile forms for the Tennessee plaintiffs so  
03:41PM 10 that we can get those in no later than 60 days from now,  
11 that would start giving the defendants their medical  
12 authorizations and other things that they want so that  
13 we can start that process of collecting the records and  
14 gathering them, and it will start moving that portion of  
15 the case along.

16 Also, order that 20 days from today initial  
17 disclosures be exchanged between the Tennessee  
18 defendants, which is big St. Thomas, little St. Thomas,  
19 the other clinics in Tennessee and the plaintiffs, that  
03:42PM 20 those be done within --

21 THE COURT: Can I just say, I don't see why,  
22 now that we've had the Rule 16 conference, right, so the  
23 parties that at least who have had a discussion, I don't  
24 think you need an order for me to exchange automatic  
25 disclosure.

1           There's no reason why you can't start that  
2 process, and you may well be right that we end up with a  
3 Tennessee-specific order. I'd like to try at this point  
4 to develop a more common order, so I'm hesitant to order  
5 that the PSC sheets just for Tennessee get going.

6           What I'd like to do is hopefully develop a  
7 framework where everything gets going, and maybe that  
8 means we have to wait three more weeks, but in the  
9 scheme of this case, I don't think it's that much time,  
10 so I appreciate the suggestion, and there's no reason  
11 why you can't exchange automatic disclosure now that, as  
12 far as I see it, I understand some people might say you  
13 have to wait to have the Rule 26 conference, but since I  
14 haven't heard any objection to this being the Rule 26  
15 conference, I don't see why that can't getting going on  
16 a voluntarily basis anyway.

17           MR. REHNQUIST: From the perspective of the  
18 national defendants like Unifirst, I mean, I couldn't  
19 agree with you more. We are going to have a big problem  
20 and a big fight if the PSC continues to insist on a  
21 bellwether process for each state with a prospect of 140  
22 cases on a national basis that have to be individually  
23 fact discovered, 70 instead of 10 bellwether trials, so  
24 I think it's very important, and I couldn't agree more,  
25 to put the brakes right now on this prospect of



1 state-by-state-by-state bellwethers.

2 THE COURT: My gut -- obviously both of them  
3 need to be addressed, right, the bellwether process and  
4 the common discovery. I'd like to get the common  
5 discovery going as soon as I can, and then we can deal  
6 with the bellwether process, and I'm not anticipating  
7 that there's a long time between the two, but it seems  
8 to me it could actually be in two steps.

9 MR. STRANCH: As long as common discovery is  
03:44PM 10 open and we can start moving because we're running into  
11 the problem where witnesses are leaving jobs and moving  
12 on, it's being over two years, memories are changing,  
13 you know, documents are getting lost. We need to start  
14 getting down what's going on in the case, and if that  
15 means we need to wait three more months before the Court  
16 puts down an order of here exactly how the bellwether  
17 process is going to go, that's okay as long as we're  
18 doing discovery in the interim on a common basis because  
19 the case needs to move.

03:44PM 20 Yes.

21 MS. PARKER: I don't want to belabor the  
22 point, your Honor, but I do think it bears mention that  
23 the PSC can only litigate the cases that have been filed  
24 and are in the MDL. Right now it happens that there are  
25 100-plus Tennessee cases that have been filed.

1           The only other "chunk," to use an informal  
2 word, I couldn't come up with better than "chunk," the  
3 only other chunk of cases that are filed in the MDL  
4 involve New Jersey clinic defendants. The primary  
5 New Jersey clinic defendant is mediating, so it may be  
6 that in the future going forward, as we get to states  
7 with two-year statute of limitations filing cases and  
8 three-year statute of limitations, there certainly may  
9 be some grouping beyond just single states, but, for  
10 now, I think we are actually, the PSC is trying to heed  
11 Judge Fallon's suggestion that the transferee court  
12 should first catalogue the entire universe of cases that  
13 comprise the MDL and attempt to divide the cases into  
14 categories based on those variables.

15           MR. BRACERAS: Your Honor, just some clarity  
16 on that.

17           THE COURT: Yes.

18           MR. BRACERAS: Is that we have received  
19 dozens of cases filed against Unifirst served on  
20 Unifirst from Indiana, so that certainly is a very big  
21 chunk, and we're talking approaching 30, 40, 50 new  
22 cases just in the last year, and also at the same time,  
23 the PSC has approached us repeatedly about tolling  
24 agreements, so there's a little contradiction here that  
25 they're talking about they can only litigate the cases

1 that have been filed, but at the same time, they're  
2 asking us about tolling agreements.

3 The broader point, your Honor, we agree that  
4 common discovery, we support going forward with common  
5 discovery. The fact is I don't think common discovery  
6 could be completed in less than 18 months, as it would  
7 in a regular case, and if you look at the matter as a  
8 matter of practice, by that time all the statute of  
9 limitations would have run in every jurisdiction, and  
03:46PM 10 unless the PSC is still seeking tolling agreements from  
11 the defendants, then we won't have to struggle with this  
12 issue, so after common discovery is over in what I  
13 believe would be at least 18 months after expert  
14 discovery, by that time when we're selecting  
15 bellwethers, all of the selections will have run, and  
16 we'll be able to get truly representative bellwethers,  
17 as Judge Fallon has done in every other bellwether  
18 process, which was multi-jurisdiction, not limited to a  
19 single state. Thank you.

03:47PM 20 THE COURT: Yes.

21 MR. GIDEON: Your Honor, it's C.J. Gideon  
22 again on behalf of the clinic defendants. I wanted to  
23 just address three points. The first one was one of the  
24 elements of Rule 16 is the Court's sitting down with  
25 parties and taking the steps to formulate and simplify

1 the issues, which as you well know also means putting  
2 the pressure on the parties to say is this really an  
3 issue that we're going to spend any time on in this  
4 litigation?

5 One of the complaints that's repeated over  
6 and over again in each of the master complaints is the  
7 notion that everybody who purchased any products should  
8 have gone to this place and done a walk-about and  
9 inspected it the same they should do for any other  
10 compound or all 3,360 purchasers.

03:47PM

11 The third-party discovery mentioned by  
12 counsel for the PSC reflects that one of the finest  
13 hospitals in the United States right here took a  
14 consultant, did the inspection, did the inspection in  
15 2012 and continued purchasing from NECC.

16 My point behind this example is at some  
17 point in time, your Honor might well be well-served to  
18 schedule a conference to formulate and simplify the  
19 issues that actually need to be addressed in common  
20 discovery at a savings in time and expense.

03:48PM

21 From our standpoint as well, we respectfully  
22 submit that there should be consideration of a remand of  
23 the Tennessee cases after the common discovery is  
24 finished.

25 THE COURT: Well, I assume you'll file that

1 motion if you think it's appropriate at a later time.

2 MR. GIDEON: We will, but as you noted, we  
3 suggested, really we are the only ones that suggested  
4 just a completion of common discovery first, then  
5 consideration of Tennessee mediation specifically. We  
6 will propose remand of the cases at that stage if all  
7 the common discovery is completed and it is time to try  
8 an appropriate number of Tennessee cases in Tennessee.

9 THE COURT: Thank you.

03:49PM

10 MR. GIDEON: Thank you.

11 THE COURT: Well, thank you very much. This  
12 has all been very helpful, and I share your enthusiasm  
13 for getting moving with discovery. Thank you very much.

14 MS. GREER: Your Honor, may I address one  
15 point?

16 THE COURT: Yes.

17 MS. GREER: It's kind of a housekeeping  
18 point, but it is an important one because the deposition  
19 protocol issue was raised.

03:49PM

20 THE COURT: Yes, and I know I have to issue  
21 that, yes.

22 MS. GREER: I understand that, but my  
23 concern is that if you issue the deposition protocol  
24 before a plan is in place, we have sequenced it as  
25 Judge Saylor advised us he expected it to be done with

1 the written discovery to occur first and then the  
2 deposition. If the protocol is issued in the absence of  
3 an order, we don't want all of a sudden to get  
4 deposition notices, which has happened in the past.

5 THE COURT: Well, I had the same concern,  
6 and I read over, I have a draft deposition protocol, and  
7 I was worried about the same thing, whether it should be  
8 issued. I could be wrong.

9 I didn't see anything in the protocol that  
03:50PM 10 was specifically linked to any decision on timing. I  
11 could be wrong about that, but I don't remember it. I  
12 understand your concern that typically there's written  
13 discovery before there's deposition notices or  
14 depositions taken, but I don't think the protocol  
15 influences that at all, I think it just sets frameworks  
16 for taking the depositions when they are going to taken.

17 MS. GREER: Well, I just want to be very,  
18 very clear about that because that has been the subject  
19 of misunderstandings in the past, and one of the things  
03:50PM 20 that we're relying on is that we envision the protocol,  
21 just like the ESI protocol, as being a piece that  
22 supports a plan.

23 THE COURT: Yes.

24 MS. GREER: But without the plan --

25 THE COURT: And you're absolutely right,

1 usually I don't issue a deposition protocol or an ESI  
2 protocol before we have a schedule, but this case has a  
3 lot of unusual things in it.

4 MS. GREER: Sure, absolutely, as long as we  
5 all understand that that doesn't mean it's open season  
6 on depositions.

7 THE COURT: Yes. Anything further from the  
8 PSC?

9 MR. STRANCH: No, your Honor, we're ready to  
10 go forth and do discovery.

11 THE COURT: Thank you very much.

12 MR. STRANCH: Thank you, your Honor.

13 THE CLERK: All rise. The Court is in  
14 recess.

15 (Whereupon, the hearing was adjourned at  
16 3:54 p.m.)

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03:51PM

## C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I do hereby certify that the foregoing  
transcript, Pages 1 through 56 inclusive, was recorded  
by me stenographically at the time and place aforesaid  
in MDL NO. 13-02419-RWZ, IN RE: NEW ENGLAND COMPOUNDING  
PHARMACY CASES LITIGATION and thereafter by me reduced  
to typewriting and is a true and accurate record of the  
proceedings.

Dated this July 23, 2014.

s/s Valerie A. O'Hara

\_\_\_\_\_  
VALERIE A. O'HARA

OFFICIAL COURT REPORTER